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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

No. 1173

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

vs.

HARVEY THOMAS SMOOT, JR.,
Respondent.

OPPOSING BRIEF OF RESPONDENT

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I

STATEMENT OF THE CASE

In this case, the Respondent, Sgt. Harvey Thomas Smoot, Jr., was insured by Petitioner. The policy by its terms reserved to the company exclusive right to handle any claims made under the terms thereof. By its policy (R., I, p. 317) the company specifically contracts to defend any suit with respect to the insurance afforded which may be brought against the insured seeking damage even if such suit be groundless, false or fraudulent.

On November 5, 1955, Respondent was driving his insured vehicle, and by reason of the fact that he was watching some children on bicycles on the right side of the road, he failed to notice that the traffic had come to a stop in front of him (R., II, pp. 684, 924). He related to the company in his statement that he did not see the *"cars stopped"*, and when *"looked back"* he *"saw the tail lights of the car in front"*. He *"slammed on brakes"* but hit *"the rear of the car being driven by Mrs. Katie Mae Donaldson"* (R., II, p. 925). The impact was sufficient to involve five automobiles caused by him hitting the last one in the line of traffic (R., II, p. 685) and to knock Mrs. Donaldson's mother *"down on the floor"* of the vehicle (R., II, p. 868). He reported to the company and it took exclusive control of the matter (R., II, p. 686).

The Respondent, a member of the United States Air Force, about two months after collision on February 14, 1956, left this country for overseas duty on the island of Guam (R., II, p. 687). He was fully confident that his company had fixed the car and settled the matter. However, it appears that after the visit of Sgt. Smoot to the company's office on Monday after the accident occurred on Saturday (R., II, p. 686) nothing was done to investigate the claim until November 21, 1955, at which time Mr. Jack Usher took Sgt. Smoot's statement (R., II, p. 897). The statement would have informed anyone that Sgt. Smoot was absolutely liable (R., II, pp. 924-926). The record reflects that by the time the company instituted an investigation, they could not secure a statement from Mrs. Donaldson because she had, by that time, retained an attorney, Mr. Anton F. Solms, Jr. (R., II, p. 899). Moreover, the existence of severe injury had manifested itself (R., I, p. 328). Even though the company was aware that the lady was injured it did not attempt to have her examined early in the case so that it could properly evaluate her claim. She was at all

times willing to submit to examination (R., I, p. 365). The company simply awaited medical information from Mr. Solms which it received on or about March 23, 1956 (R., II, p. 899):

After Respondent had left this country, Mr. Solms, on March 20, 1956, addressed a letter to the Petitioner in which he enclosed the medical report of Dr. Harry E. Rollings dated December 1, 1955 (R., I, pp. 327-329). The report informed the Petitioner that:

(a) She suffered a whiplash injury.
(b) The soreness progressively increased.
(c) There was marked muscular spasm of the muscles supporting the head and spine.
(d) X-rays showed marked loss of normal lordosis.
(e) Narrowing of the fifth intervertebral space; and,
(f) Misalignment of the fifth cervical vertebra.
(g) She required continuous traction of the neck.
(h) There may be permanent discomfort.
(i) Certainty that she was seriously injured.

Although this medical information had been available since December 1, 1955, the company in investigating the case utterly failed to get this information before March 23, 1956, either from Mr. Solms or by independent examination (R., II, p. 889). Notwithstanding the fact that the company knew as early as March 23, 1956, that x-rays had been taken, of which Sgt. Smoot was not informed (R., II, pp. 887, 926), not one single effort was made to get the available x-rays so that the company's selected physicians and specialists could see and evaluate them. The first time the company's doctors laid eyes on the x-rays was when they sat on the witness stand in the presence of the jury testifying to the seriousiness and consequences of the lady's injuries depicted by the films (Dr. Gottschalk's testimony

R., I, pp. 397-423; Dr. Clary's testimony R., I, pp. 437-458). Mr. Solms' letter of March 20, 1956, also enclosed a medical report from Dr. Rollings dated March 12, 1956, which informed the insurer that the lady required considerable treatment and that x-rays taken January 27, 1956, showed *"no significant changes"*, obviously meaning that the narrowing of the fifth cervical space and bony misalignment was still present. While this medical report stated that as of February 27, 1956, she was having no more pain; that physical examination (but not x-rays) of the neck was negative; and at the time treatment was discontinued, the medical report afforded no real comfort because reoccurrence of symptoms was possible and the passage of time only would tell whether they would or not. This letter (R., I, p. 325) expressing a mere hope that she would remain free from pain unquestionably put the insurer on notice that *x-ray findings* were essentially the same as those previously taken. These medical reports were submitted to inform the Appellant of the serious nature of the injuries and to substantiate the Four Thousand ($4,000) Dollar offer of settlement contained in Mr. Solms' letter of March 20, 1956, which was made so low after Respondent had left the country and service of process upon him was questionable (R., I, pp. 332-334).

So the posture of the case at that time was that the lady had been seriously hurt and under treatment for a period spanning four months; that Sgt. Smoot had moved from his home which he owned on Emory Drive and was not in this country; and that he was in the armed forces and any litigation brought against him could have been stayed under the Sailors and Soldiers Act and it was uncertain when he would return to this jurisdiction even if service of process could have been made. The insurer used the circumstances of his absence and the right to *"stay litigation"* to reject the Four Thousand ($4,000) Dollar

offer to settle (R., I, p. 335). This was done irrespective of the probability of great damage to insured. The witness' demeanor as can be detected from reading his testimony made it perfectly obvious that Sgt. Smoot's absence was exactly why the company rejected the offer to settle. Certainly the facts of the accident which demonstrated absolute liability could not convincingly be advanced as a reason for not settling and surely the severity of the injuries related would inform anyone that the value of the case exceeded the Four Thousand ($4,000) Dollar offer. This was especially true when the settlement figure included property and other special damages.

If the severity of the injuries afforded any excuse at all for the company's rejection of the Four Thousand ($4,000) Dollar offer to settle as of March 23, 1956, then certainly such excuse completely dissipated on or about July 12, 1956, when the insurer received a letter from Mr. Solms which informed the company that indeed symptoms had reoccurred in the lady in a most alarming way. She was then, *"suffering with her right arm"* and the doctor had told her that *"it is due to the nerve injury in her neck and spine"*. The letter offered absolute latitude to the insurer to have the lady examined (R., I, p. 346) and all medical information was made available to the company. Sgt. Smoot was still on Guam and the insurer was in no hurry, for it did not have the lady examined until September 27, 1956, more than two (2) months thereafter. When the insurer did have her examined by Dr. Gottschalk on September 27, 1956, no one bothered to secure the x-rays (R., I, pp. 408, 416, 418, 423) that had been taken of the lady so that Dr. Gottschalk might interpret the narrowing of the inter disc space and misalignment depicted by the film. This was true even though the insurer was fully aware of the film (R., I, pp. 328-329-330). The only excuse for not having the lady examined before September 27, 1956,

was that it was a matter of *"judgment"* on the part of the adjuster (R., II, p. 889). In any event the insurer did secure an examination on September 27, 1956, and although more than ten (10) months had expired from the date of the collision, his medical report clearly put the insurer on notice that she was still symptomatic (R., I, pp. 362-365). By this time, the offer to settle had increased to Five Thousand ($5,000) Dollars and Mr. James W. Head had entered the case as associate counsel (R., II, p. 642). The offer of Five Thousand ($5,000) Dollars was rejected and again Sgt. Smoot, still on Guam, was not informed that the lady was still symptomatic after more than ten (10) months and he was not informed that the company had rejected any offer to settle (R., II, p. 887).

Because the insurer had rejected all offers to settle, the Donaldsons filed suits in the City Court of Savannah on or about December 20, 1956, in which Mrs. Donaldson claimed Thirty-three Thousand, Nine Hundred and Eighty ($33,980) Dollars for personal injuries and Mr. Donaldson, contrary to the implication by Appellant, claimed, in a separate suit *as required by law,* Two Thousand Nine Hundred Twenty-Two and 83/100 ($2,922.83) Dollars for his special damages. Mrs. Donaldson's condition persisted —the fifty (50%) per cent narrowing of the fifth cervical vertebra disc space and misalignment still prevailed. She was still under treatment for pain on June 4, 1958, more than two and one-half years after the collision (R., II, p. 483). Yet, at the time suits were filed and thereafter up to just before the trial the insurer made absolutely no effort to secure further medical information but continued to reject all offers to settle, all of which were within the policy limits.

Service of the first suits filed by the defendants was attempted to be made upon Sgt. Smoot as a resident of the

State of Georgia at his home which he owned located on Emory Drive in Savannah (R., II, p. 606). But these suits were dismissed because Sgt. Smoot had moved his residence and was out of the country. He could not be served with process as a resident (R., II, p. 606). The Donaldsons refiled their suits and this time they sought to perfect service upon Sgt. Smoot under the Non-Resident Motorist Act (R., II, p. 606). But at that time, December, 1956, the Non-Resident Motorist Act contained no provision for perfecting service upon a resident who had moved from the jurisdiction of the state. It was not until 1957 that the legislature amended the act and added the section codified as *Section 68-808 of the Georgia Code, Annotated,* which included residents who moved from the state under the term *"non-resident"*. Because there appeared no statutory means of perfecting service upon Sgt. Smoot in 1956, the Donaldsons' attorneys attempted service in both ways prescribed under the then existing Non-Resident Motorist Act, i.e. through the Secretary of State and by personal certified mail (R., II, p. 607). They were worried about the all important requirement of service and were trying to be prepared for a jurisdictional attack. The legality of the service of Sgt. Smoot was always in serious doubt and the insurer was aware of this question and ultimately filed a Plea to the Jurisdiction challenging service (R., I, pp. 369-371).

Copies of the suits filed were received by Sgt. Smoot by mail and he promptly forwarded them to the company. At the time the company received the processes, the company's file certainly reflected the seriousness of Mrs. Donaldson 's injury. The company was further aware of the persistent Five Thousand ($5,000) Dollar demand of Mrs. Donaldson and was aware that Mr. Donaldson was now claiming Two Thousand, Nine Hundred Twenty-Two and 83/100 ($2,922.83) Dollars as special damages. The demands

approached the maximum policy limits. After receipt of the processes the insurer constructed a letter to its insured dated February 5, 1957 (R., II, p. 502), which was designed to assure him that the matter would be given all *"necessary attention"* and informed him that the policy required his cooperation. After the foregoing assurances (R., II, pp. 503, 708-709) the insurer's letter advised that *"there may be a personal liability upon your part"*, knowing very well the seriousness of the injuries sustained and that Sgt. Smoot had no information whatsoever of the circumstances of the matter. The letter then advised that he could procure attorneys of his own choosing to represent him personally in addition to the attorneys the company had selected. The company felt that this letter would constitute a shield protecting it from its insured in any claim by him for its negligence and bad faith in the handling of the Donaldsons' claims against him. This is flagrantly evident from the record.

Although service and jurisdiction was questionable the insurer filed for a stay of litigation on February 11, 1957 (R., I, p. 369). At this time, the company felt that its February 5th letter protected it from any claim of negligence or bad faith, it knew that the Donaldsons' demands were near its policy limits and it also knew that during the time litigation could be stayed it would retain in its possession whatever amount it was obligated to pay; and certainly it knew that money earns interest (R., I, pp. 334-337, 352).

On January 6, 1958, Sgt. Smoot returns to the jurisdiction and makes this fact known to the company (R., I, p. 464). This was approximately six months before the cases were tried and was sufficient time to prepare for defense (R., II, p. 665). On February 28, 1958, the company filed a Plea to the Jurisdiction and an Answer, but failed

to demand a special trial by jury separating the issues of jurisdiction from the merits of the case which unquestionably contained evidence of severe injury sufficient to arouse sympathy and compassion (R., I, p. 375). Moreover, the company submitted the jurisdictional question to the trial judge and failed to record the evidence (R., I, p. 375). Although it was felt by the company that a transcript of the evidence would be essential in the event of appeal (R., I, p. 380). A this point, the company had little or nothing to lose, it thought, but the risk to its insured was mammoth.

On March 11, 1958, the Judge of the City Court by written order overruled the plea to the jurisdiction in which order the Judge recited the facts upon which he reached his conclusion (R., I, p. 376). Following this order the company took no steps to have the order amended so that the written order would contain all evidence, felt necessary by the company, for a clear understanding by the appellate courts of any errors which the company could have complained. This the company failed to do in the face of the fact that it recognized that the facts recited by the judge were insufficient (R., I, p. 380). On the other hand the company also contends that the Judge of the City Court simply narrated the facts and the company did not at the time, nor does it now, feel that any material facts were left out. In that event the antecedent ruling certainly could have been appealed and there is no excuse for not having done so (R., I, p. 379).

Although Sgt. Smoot had been back in the jurisdiction since January of 1958, the record reflects that little was done to further investigate the claims and prepare for the trial made inevitable by the insurance company failing to settle within the policy limits. The company made no effort to have Mrs. Donaldson re-examined until June 3, 1958 (R., II, pp. 464-465), two days before the trial. As

early as nine days before the trial Mrs. Donaldson had been examined by Dr. Heffernan (R., II, p. 465) and had been re-x-rayed by Dr. Silver, radiologist (R., II, p. 490). But no one for the insured went to the trouble to find out the results of these medical examinations, although it is abundantly clear that claimants were at all times willing to reveal the medical information and to have the company examine her. The record further clearly reflects that settlement within the policy limits was always possible until after the expiration of the time for appeal and the jurisdictional question was rendered moot (R., II, p. 644).

The record does indicate that Sgt. Smoot was interviewed at his home regarding the facts of the collision and that he was accompanied to the scene of the accident so that everyone would have a clear picture of exactly what happened (R., II, p. 816). The facts were that Smoot was traveling south on Skidaway Road and had his attention fixed on some children on bicycles who were on the right side of the road and were proceeding *north* (R., II, p. 827). There was nothing in the facts or the circumstances of the incident that remotely suggested any state of emergency. But the presence of the children at the time and Smoot's *"carefully"* watching them constituted the sole thread of defense. Even as to this the company demonstrated a complete lack of concern for the defense of its insured because in its answer the company alleged that the children were proceeding *south* which was contrary to the facts related to it. The company, in open court, took credit for the error (R., II, p. 828). It should be noted that in the defense of the present case the company representative recalled in great detail the minute facts tending to establish that Sgt. Smoot was well informed (R., II, pp. 818, 819) but he had absolutely no recollection of the *"crucial facts"* which constitute the very heart of the City Court defense (R., II, pp. 825-829).

On June 3, 1958, two days before trial the company had Mrs. Donaldson re-examined by Dr. Gottschalk in preparation of the defense and at his suggestion she was referred to Dr. Clary who specializes in neuro-surgery. Again, no one bothered to secure the x-rays that had been taken of the lady, the existence of some of which had been known by the company since March 23, 1956 (R., I, pp. 325, 327-328, 329-330), so that such x-rays could be interpreted. These x-rays depicted a fifty (50%) per cent narrowing of the fifth inter space, misalignment of the cervical spine and the development of traumatic arthritis. The x-rays would surely be introduced in evidence. The only excuse offered by the company for this reckless handling of the defense was that the securing of the x-rays mentioned was the responsibility of the company selected physicians (R., I, pp. 407-410, 416-424) and therefore, this failure cannot be attributed to the adjustors, who retained absolute control of settlement matters even during the trial though admittedly incompetent regarding the probabilities of trial (R., II, p. 842) or to its attorneys, whose job it was to carry out the company's contractual obligation to defend, or any other agent, other than the physicians, who may have been called upon to fulfill that which the company contracted to do. But the company did have her examined and because she was still symptomatic, after two and one-half years, Dr. Gottschalk was concerned enough to seek the findings of a specialist and sent her to Dr. Clary. Dr. Clary also found her symptomatic and both doctors testified as to their findings. In addition, they were given an opportunity while on the stand to read the awesome details of the lady's x-rays which they had seen for the very first time. The company already knew, in substance, that its physicians were going to testify in the manner and with the impact in which they did testify as to their findings (R., I, pp. 396-400, 438, 456). Not only did the company know the substance of its

physician's testimony but the company knew that Dr. Gottschalk and Dr. Clary would confirm disc trouble. See Mr. Beckmann's testimony, page 945, where he testifies that the evaluation was in order *"particularly when Dr. Gottschalk and Dr. Clary confirmed disc trouble which is a permanent thing. . ."* It should be noted that the evaluation of which the witness is speaking, based upon medical confirmation of disc trouble, was made by the witness before trial because the offer that he is talking about was advanced before the trial commenced. The company was, therefore, satisfied that disc trouble was present before the trial commenced. Furthermore, the company had no hope of defending the case with the testimony of its medical experts because it is crystal clear that the company's doctors were called to the stand out of fear that if the company did not call them to testify then the claimants' attorneys would surely do so. See cross-examination of Donald Austin (R., II, p. 667).

For the company to have taken its uninformed insured to trial under such circumstances as existed exceeds the bounds of bad faith and smacks of malice. The observation is inescapable when the factors are considered. The settlement demands at the time of the trial were Seven Thousand Nine Hundred Twenty-two and 83/100 ($7,922.83) Dollars very near the limits (R., II, p. 606). The company had retained in its possession for nearly three years whatever it was obligated to pay and whatever that was worth in interest reduced the possible loss. It felt that it was protected from the consequences of any negligence or bad faith by its letter to the insured and it could soothe its conscience by the comforting thought that in any event the Donaldsons could not *"get blood out of a turnip"* (R., II, p. 695).

The extent to which the company's medical experts established the very severe nature of the lady's injuries

and sent the verdict soaring beyond the policy limits, is demonstrated by Dr. Clary's testimony. He was asked, knowing that he was going to confirm disc trouble, on the witness stand after he had considered the x-rays in evidence together with his own clinical findings, if he could from the x-ray *"diagnose that as a herniated or ruptured disc"* and he answered: *"No, sir, I wouldn't diagnose it as, but would certainly say that it was a possibility."* This was especially damaging testimony, coming from the defense and virtually assured the excess verdict when considered with the other medical evidence introduced in the case. After the close of the evidence, certainly every thread of reason not to settle within the policy limits, if there was the slightest in existence, was shattered by the overwhelming evidence both from the claimants and the defense. Yet, the company still refused to settle.

When the jury retired to consider its verdict, one of the company's representatives approached Mr. Anton F. Solms, one of the Donaldsons' attorneys, and asked him what he thought the jury would do. Mr. Solms responded to the effect that he thought they had a *"good case"* and that they had a chance of receiving *"what"* they *"were asking for. . ."* Mr. Solms further stated to the defense attorney that he thought Sgt. Smoot *"had a problem . . ."* (R., II, p. 646). The defense attorney then mentioned that the insurance company had written a letter to Sgt. Smoot *"about the policy limits"* and Mr. Solms then responded: *"Well I think he has got a problem because of the nature of the injuries, and the evidence."* The whole sense of the conversation was that the company had *"written Mr. Smoot a letter, putting him on notice so that he could employ an attorney, if he wished to, and defend himself against the excess possibility of the verdict, and that was what they were talking about. . ."* (R., II, pp. 647, 648). Moreover, the attitude of the company is clear from the record. The company had

written to its insured a letter regarding a possible excess verdict and since its insured had not secured his own attorney, the company would be protected from the consequences of its negligence and bad faith. The company was not *"worried about that"* (R., II, p. 661):

Now, to prove beyond doubt that such was the vicious attitude of the company from February 5, 1957, the date of the letter (R., II, p. 502), when Sgt. Smoot filed his suit, one of the first things the company did was to file a motion to dismiss his complaint attaching a copy of the letter contending that the letter constituted an estoppel and that no relief could be granted to the insured by reason thereof. That motion is a part of the records in this case and was included by stipulation in the evidence considered by the jury.[1] Returning again to the claim cases in the City Court of Savannah, the jury returned verdicts totaling Twenty-Six Thousand Nine Hundred Two and 83/100 ($26,902.83) Dollars against Sgt. Smoot, upon which judgments and executions were taken on June 9, 1958 (R., II, p. 760). On June 10, 1958, motions for new trial were filed by the company thus preventing any independent appeal which the insured may have desired to make (R., II, pp. 524-527). The appeal was taken with the same casual regard and absolute lack of concern for the insured's interest as was exhibited in the entire handling of the claims before verdict. In filing the motions for new trial the company attached a Rule Nisi assigning July 11, 1958, as the date of hearing which created an absolute deadline beyond which a brief of evidence to support the motions for new trial could not under the law be filed (R., II, pp. 527-533). The company could have, in the Rule Nisi, reserved the right to

1. This court held that the letter did not reduce the absolute obligation to exercise good faith and prudence in the defense promised by the policy: *Smoot* v. *State Farm Mutual Automobile Insurance Co.*, 299 F.2d 525.

file a brief of the evidence *"until the final hearing whenever the same may be heard"* thus extending the time in which a brief of evidence could have been filed but this the company utterly failed to do. Furthermore, notwithstanding the fact that the company knew that the record would not be ready by the deadline it had created, the company failed to see to it that the record was produced in the time allowed by law and its own Rule Nisi Order. The entire proceedings were on tape recording and any number of typists could have put the record together (R., II, pp. 535-536) but the company failed to have this done.

On July 11, 1958, the Donaldsons' attorneys filed a motion to dismiss the motions for new trial because a brief of evidence had not been filed (R., II, p. 540). The motion to dismiss was a very serious challenge to all of the grounds for a new trial and would have put anybody on notice of the possibility that the grounds for a new trial may not be considered by the appellate courts. The company exercising the slightest imaginable diligence would have appealed all antecedent rulings of the City Court so that there would have been some assurance that the appellate courts would at least consider some phase of the appeal. If for no other reason, this should have been done because it is common knowledge that an appeal assuring appellate review has a very definite value in settlement negotiations.

The company had filed a plea seriously challenging the jurisdiction of the court because of service but utterly failed to assign error on the order overruling the plea. The Donaldson's attorneys were extremely concerned about the jurisdictional question (R., II, p. 607) and would have settled within the policy limits up to the point where they were sure that the jurisdictional question was not raised and therefore, the appellate courts would not be considering that issue (R., II, p. 645). Of course, the 1957 Act which

provided for service, under the Non-Resident Motorist Act, upon a resident who had moved before suit, is and has always been unconstitutional[2] and we submit that if it was unconstitutional to serve a civilian resident who had moved from the jurisdiction before suit, then it was just as unconstitutional to serve Sgt. Smoot, who had left his residence in the State of Georgia before suits were filed against him. But whether the appellate courts would have or would not have favorably decided the jurisdictional question is not really the point with which we are here dealing. The point here involved is that because of the bad faith and conscious disregard for Sgt. Smoot's interest he was not afforded the opportunity by his trusted insurer to have the appellate courts consider his case either on the grounds for new trial or on the jurisdictional question nor did he have an opportunity to bargain for a settlement within the policy limits because of a valid and serious threat to the verdict rendered against him. But total lack of interest and regard for consequences did not stop here. In designating the record in the bill of exceptions which the company did manage to get tendered, the company did not bother to check the file or the records to determine what proceedings had been filed in the case so that the proceedings could be properly designated (R., II, pp. 616-618). The company now contends that the questions of law involved in the Rule Nisi Order were highly technical and constituted a matter involving *"a narrow procedural question"*. But, the company certainly offers no excuse as to why it failed to file a motion for rehearing and to seek a writ of certiorari to refute the conclusion, authorized by the evidence, that the company did not in good faith prosecute the appeal simply because, even in the event of a new trial, it would not have saved any of its policy limits and the appeal was nothing more than added expense.

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2. Declared unconstitutional in *Young* v. *Morrison*, 220 Ga. 127, 137 S.E.2d 456.

On February 27, 1959, the Court of Appeals of Georgia returned a decision upon the cross bill filed by the Donaldsons' attorneys.[3] Since there was no motion for a rehearing the judgments against the insured became final and all possibilities of settlement for less than the total amount of judgments plus seven (7%) per cent legal interest was destroyed. On March 19, 1959, the company delivered to the Sheriff of the City Court of Savannah a check payable to the Sheriff in the amount of Ten Thousand ($10,000) Dollars which was attached to a letter requesting the Sheriff to *"please apply"* that check to the outstanding execution of Mrs. Donaldson. On the same date the company delivered a check in the amount of Three Hundred Seventy Two and 71/100 ($372.71) Dollars payable to the Sheriff which was attached to a letter requesting that he *"please apply"* that amount on the outstanding execution of Mr. Donaldson. On March 23, 1959, just four days after the company had paid what is considered its policy limits to the Sheriff, the company filed petitions, one in each of the Donaldson cases in the City Court in which the insurance company prayed *"that the court enter an order discharging the insurer from any obligations to the plaintiff or to any other party growing out of the cause of action alleged in the captioned cause or growing out of the judgment which has been entered previously in this case"* (R., II, pp. 576-582). The intent of the company was to seek a court order exonerating it from any claims which its insured may make against it for its conscious indifference to consequences (R., II, p. 578).

Sgt. Smoot filed his complaint against the insurance company in the City Court of Savannah on July 14, 1959. On July 31, 1959, the insurance company removed the case to the United States District Court for the Southern District of Georgia and filed, together with other motions, its motion

3. See *Smoot, Jr.* v. *Donaldson*, 99 Ga. App. 191, 108 S.E.2d 295, 1959.

to dismiss contending that its letter of February 5, 1957, to its insured, operated as an estoppel. By these groundless proceedings, the Petitioner entered upon a path of stubborn litigiousness composed of repeated moves for damaging delays to be taken. Such moves, among other things, included the insistence on the part of the Petitioner to take Respondent's testimony when trial was assigned. This caused Respondent to be put to the expense of a long-distance trip without having a trial on the merits of the case. The tactics also included the filing, at the eleventh hour, of preposterous proceedings which could accomplish nothing but more delay, trouble and expenses to the Respondent (R., II, pp. 745-746). The record in this case by stipulation of both parties was sent out with the jury (R., II, p. 950) and clearly shows the stubborn and unwarranted litigiousness of the Petitioner in this case by the filing of such ridiculous proceedings. It shows that in May of 1963, this case was again assigned for trial and that Respondent this time was brought from the Azores Islands. It shows that after the assignment, the Petitioner filed proceedings contending that simply because the insurance had paid its policy limits into the City Court to apply on the outstanding executions against Sgt. Smoot that such payments amounted to an accord and satisfaction. In accordance with the design, the proceedings filed resulted in exactly what was expected of them. The case was again postponed. Sgt. Smoot had traveled to Savannah for the trial to no avail. More expensive appeals were necessitated and Respondent's will and determination to continue the litigation had been all but crushed by the company's relentless efforts to litigate him into the ground. During this time the Respondent could not sell his home on Emory Drive because of the judgments outstanding against him (R., II, p. 746) and because of the long drawn out litigation he could not make any other disposition of the property. He was compelled to maintain and

shelter his family where he was stationed for duty and to continue maintaining his house in Georgia (R., II, p. 715). Because of the trouble and expense of the litigation and the continuance of the executions against him, he finally failed financially and foreclosure proceedings were had against him on February 4, 1965 (R., II, pp. 672-673). This, of course, added to the damage to Sgt. Smoot's credit and virtually rendered it impossible for him, a young man with a family, to secure a future F.H.A. loan with which to purchase another home (R., II, p. 757).

WHY CERTIORARI SHOULD BE DENIED

The application for Certiorari concerns a jury award of attorney's fees and punitive damages in an aggravated tort case under Georgia Law. The petition fails to show that the awards are in conflict with any decision or other applicable Georgia Law and fails to show that the decision of the Court of Appeals affirming said jury verdict is in conflict with any other court of appeals on the same matter. The petition does not demonstrate that the decision involves any substantial federal question which should command the attention of this court or that said decision is in any way in conflict with any applicable decision of this court or that the same constitutes a departure from accepted judicial determination.

Involving nothing more than academic questions, the petition is purely episodic. No federal question of any kind is presented and the adding of names of prominent, well-known and respected attorneys who have not heretofore been involved in this case, will not make it so.

There Was Sufficient Evidence upon Which the Jury Could Find Bad Faith and a Conscious Disregard for Consequence

An examination of this record will reveal to anyone that from the beginning and especially after it learned of Smoot's pending transfer to overseas duty, the company, long before it engaged an attorney in the nominal defense of the claims, completely abandoned all concern for the interest and protection of the insured. Such conscious disregard for the interest of the insured is abundantly expressed in the acts, omission and deliberate failures of the company to keep insured informed which we need not summarize here.

If nothing else in this case is sufficient to show that the company was conscious of its indifference to consequences and its willful and wanton conduct in leading its uninformed insured into a dangerous trial and financial destruction, certainly the filing of petitions in the City Court of Savannah seeking a judicial exoneration conclusively establishes that the insurer knew that from the very beginning it had not dealt fairly with its insured and that it would be subject to damages it had caused by its acts. An interesting sidenote is appropriate here— From the beginning, the insurer has maintained that this action may not be brought and damages recovered upon mere negligence in Georgia. See *Smoot, supra*. If this is so, then compelling logic dictates that the company must have been seeking judicial exoneration of its self-recognized bad faith.

We earnestly contend that under the great mass of evidence of reckless handling in this case there was more than sufficient proof upon which the jury could find the existence of bad faith and a conscious indifference to consequences on the part of the insurer. In addition to proven facts, the jury had the opportunity to observe the de-

meanor of the witnesses and could thereby under all of the facts and circumstances better judge intent, motive, and attitude on the part of the insurer in its trusted relationship with its insured. The jury specifically found bad faith and awarded damages. Such was within the province of the jury under our system of jurisprudence and should not be disturbed.

Percentage of Contingent Recovery Is a Proper Basis for Fixing the Fees Provided by §20-1404 of the Georgia Code

Respondent in this case prayed for attorney fees *"in a sum equal to fifty (50%) per cent of all other damages . . . prayed for"*. Not fifty (50%) per cent of whatever the jury may elect to award and not fifty (50%) per cent of the total recovery in accordance with counsel's contract introduced in evidence but a sum equal to fifty (50%) per cent of the other sums stated in the prayers which under any circumstances amounted, at the time of the trial, to the specific sum of Twenty-one Thousand Nine Hundred Twenty-Nine and 20/100 ($21,929.20) Dollars. We know of no law which would require Respondent to type out the figures, *"$21,929.20"*, in his prayer rather than state it in language which would leave it to the jury to compute. A respectable cross-section of lawyers of the local bar went to the trouble of familiarizing themselves with this, already notorious case, and testified that in this case a fee of fifty (50%) per cent of recovery is reasonable. The case has spanned nearly eight years and has involved three appeals, excluding an application for an Extraordinary Writ of Probation upon an Affidavit of Prejudice. It would seem that if fifty (50%) per cent of the total recovery is reasonable as proven, then certainly the lesser sum prayed for and awarded by the jury is reasonable and affords no ground for complaint.

The jury found, under a stern charge from the court, that the conduct of the insurer was such as to make it guilty of *"willful misconduct or malice or fraud or wantonness or oppression or that the company was guilty of that entire want of care which would raise a presumption of a conscious indifference to the consequences."* See the charges of the court requested by the Petitioner (R., II, pp. 980, 981). The bad faith referred to in *Section 20-1404 of the Georgia Code Ann.* refers to the bad faith of the defendant in the transaction out of which the cause of action arose. *Twin City Lmbr. Co.* v. *Daniels,* 22 Ga. App. 578, 96 S.E. 437; *Sunbrand Sup. Co., Inc.* v. *Garmet Fishing Equip. Corp.,* 99 Ga. App. 72, 107 S.E. 2d 680 and generally speaking, recovery may be had when the circumstances of the tort are such as to evince an entire want of care and indifference to consequences. Willful and intentional conduct is not essential. See *Battle* v. *Kilcrease, supra.* Attorney's fees are not a part of aggravated or vindictive damages but must be awarded in addition to aggravated and vindictive damages even in the case where the damages only consist of wounded feelings. *Dodd* v. *Slater,* 101 Ga. App. 358, 362, 114 S.E. 2d 167. The Dodd case is cited in Petitioner's application for certiorari and we urge the court to study this case. It will be found that the court in the Dodd case properly overruled the demurrer to the claim for attorney's fees and cites *Atlanta Journal Co.* v. *Doyal,* 82 Ga. App. 321, 60 S.E. 2d 802, as holding in effect *"that the willful violation of the rights of another, every intentional tort, invokes the species of bad faith that under the provisions of Code Section 20-1404 entitles the person wronged to recover the expense of litigation involving attorney's fees."*

Aside from the standard of conduct necessary to invoke the statute, Respondent contends that in addition to that conduct, the Petitioner has been stubbornly litigious and has caused the Respondent unnecessary trouble and expense

within the contemplations of the statute. Braving repetitious prolixity, we reemphasize to this court that the record in this case is nearly a foot thick; that by stipulation it was sent out with the jury; that repeated moves were made by the Petitioner to accomplish damaging delays; and that one of such moves involved the filing of a ridiculous plea referred to as a Plea of Accord and Satisfaction. See *Harvey Thomas Smoot, Jr.* v. *State Farm Mutual Automobile Ins. Co., et al.*, and *Donaldson* v. *Smoot, Jr., et al.*, 337 F. 2d 223. This plea was filed *"on the eve"* of trial when Respondent had been called this time from the Azores Islands for the trial of his case. One has only to reflect for a moment to see that this was a stubborn effort to cause damaging delay and to literally litigate Respondent into the ground. If Petitioner really thought that there was any kind of an accord and satisfaction, that issue could have and most certainly would have been raised years ago and not at the *"eleventh hour"* before the 1964 trial. The jury in this case got an unobstructed view of the stubborn litigiousness of the Petitioner and the character of its conduct as well.

Petitioner complains that sustaining the award of attorney's fees, under the evidence, violates Georgia Decisional Law as to proof and the establishment of value of such fees and further that a contingent fee award is an impermissible standard under Georgia Law in such a case. Yet petitioner fails to cite one single case, federal or state, to support its contention. Petitioner takes a few phrases out of context, found in *Woodruff* v. *Trost, Executrix*, 73 Ga. App. 608, 37 S.E. 2d 424 (1946), as support for its argument but a study of that case as it may be applied to the question here involved will reveal that it does not support petitioner's contention at all. If anything, it is support for the holding of the appellate court below in affirming the award of attorney's fees in this case.

In Woodruff, the petition was brought in three counts. Count one sought recovery on quantum meruit for value of services in *"resisting"* assessments made by the Federal Government against the defendant in that case. This was purely defensive work and a reading of the recital of facts by Judge Felton in that case will reveal that the court found at page 611, that *"there is no evidence showing that Mr. Trost did anything material to affect a reduction of the taxes assessed such as to authorize any such verdict as that rendered, other than his accounting work for which he was paid by Mr. Woodruff. He was entitled to remuneration for his work, but this remuneration cannot be based on the result obtained when there is no evidence of the work's bearing on the results obtained. This is not a case of breach of contract for a contingent fee where services are rewarded on the basis of results, whether the work accomplished the results or not."* On page 610, the court said *"as we have said, his effort to work out this method of procedure availed nothing."* Previous to the above quotations the court stated on page 609, that *"after a careful study of the evidence, we have concluded that there is not sufficient evidence to support the jury's findings either on the theory that the actual work done was worth a particular amount, or that the results obtained were worth a particular amount, or that both combined were worth a particular amount."* It is interesting to note for the purposes of the case sub judice, that the Georgia court in Woodruff, even as to Count I, talks in terms of, *"results obtained"* and it is obvious that the court did not sustain the award of attorney's fees under Count I because no results were obtained from the plaintiff's efforts and therefore, all that was left was the actual work done and the court held that there was insufficient proof as to the amount of work performed to authorize such a recovery as was awarded under Count I in that case. Perhaps, the court would have reached a different result had the plain-

tiff's efforts in that case resulted in great benefit to the defendant.

It is from Count I in Woodruff that petitioner here takes its excerpts. Petitioner wholly ignores the decision of the Georgia court as to Count II in the Woodruff case. Count II sought recovery for the alleged reasonable value of services (quantum meruit) rendered in the *"recovery"* of certain shares of stock having great value. Here we see recovery sought on quantum meruit predicated purely upon *"recovery"* or *"results"* obtained and a reading of Count II will reveal that very little work as such was done. On page 614, the court states *"the principal item of service Mr. Trost rendered was his idea of making the investigation and the result obtained, since it cost nothing but a little stationery and a few stamps."* The court further states *"we cannot say as a matter of law, that the services in recovering the twelve hundred shares worth $190,000 and collecting $6,800 in dividends were not of the reasonable value of $5,000."*

Count III of the Woodruff case has no application to the case sub judice and will not be considered here but it is quite apparent from the foregoing that to recover fees on quantum meruit under Georgia Law does not depend necessarily on evidence as to the time involved or the precise nature and extent of the services rendered. Hence, the Woodruff case, *supra*, supports the opinion of the appellate court below affirming the award of attorney's fees and the basis upon which they were computed. Certainly, the Woodruff case cannot be considered as condemning *"percentage of contingent recovery"* as a basis for fixing the fees provided by §20-1404. The petitioner has utterly failed to point out any decision of the Georgia courts or any other court in conflict with what was held by the appellate court below.

One other contention remains to be answered. Petitioner contends that the trial court, in its instructions, permitted the jury to award attorney's fees under Code §20-1404 if it found that the defendant was *"stubbornly litigious"* and that an award of attorney's fees for stubborn litigiousness in this case amounts to deprivation of the constitutional right of a litigant to defend a case to the hilt, without fear of punishment if the effort is unsuccessful. We are unaware of any constitutional provision of law that a litigant may defend a case to the *"hilt"* without fear of punishment and Petitioner cites none. We concede that no person shall be deprived of the right to prosecute or defend his own cause in any of the courts, but this does not mean that a party may stubbornly litigate simply for the sake of litigation and cause the opposite party unnecessary trouble and expense. The Georgia Code Section is but a codification of the common law and we perceive that similar provisions are prevalent throughout this land. Petitioner cites no authority to support its contention that the application of this Code Section to the facts of this case violates any constitutional right.

Punitive Damages Were Properly Awarded

The Respondent prayed for and was awarded special and general damages by reason of the tort committed upon him by his trusted insurer. *Section 105-2002 of the Georgia Code Ann.* provides that *"in every tort there may be aggravating circumstances, either in the action or the intention, and in that event the jury may give additional damages, either to deter the wrong doer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."* In this case the Respondent alleged and proved that the Petitioner committed a tort against him and that Petitioner's acts of negligence were willful and wanton and that the Petitioner, in bad faith, exercised a complete disregard for the interest and protection of the Respondent whom it contracted to serve, and at all times acted in its sole interest and with a conscious disregard for the consequences of its acts, contrary to the laws of Georgia. We have stated in detail and reemphasized many of the pertinent acts and conduct of the Petitioner in this case and do not feel the necessity of reiteration here. Suffice it to say, that the proven acts of the Petitioner were sufficient to show aggravating circumstances to warrant the award of punitive or exemplary damages under the laws of Georgia. *Interstate Life & Accd. Co.* v. *Brewer,* 56 Ga. App. 599, 195 S.E. 458. A proper construction of *Section 105-2002 of the Georgia Code, Ann.* is that aggravated damages may be awarded as additional damages to such damages as may be primarily recovered in a pending tort action. There must be a right under the pleadings and evidence to recover general, nominal or special damages, otherwise, punitive damages are not and cannot be additional damages. Where neither general nor nominal damages are prayed for and special damages are held not to be recoverable then punitive damages are not allowed. *Beverly* v. *Observer Pub. Co.,* 88 Ga. App. 490, 77 S.E. 2d 80; *Foster* v. *Sikes,* 202 Ga. 122, 42 S.E. 2d 441. In this case, special damages as well as general damages were specifically prayed for and were specifically awarded by the jury.

Generally speaking, in a tort claim, recovery of aggravated damages may be authorized when the circumstances of the tort are such as to evince an entire want of care and indifference to consequences. Surely to lead an uninformed insured into an obviously dangerous case simply because the settlement offers were near the policy limits and insurer had nothing to lose and because it thought it was protected from damages by its letter, and to put in evidence the testimony of its specialists, out of fear, knowing that such specialists would confirm the very serious

nature of the injury and the probability of disc rupture in the light of medical evidence already adduced that the troubled area was too close to the brain for surgery to be recommended, is such conduct as to evince an entire want of care for the interest of its insured and a conscious indifference to consequences. And while willful and intentional misconduct is not essential, *Battle* v. *Kilcrease*, 54 Ga. App. 808, 189 S.E. 573, the conclusion of willfulness is inescapable when the foregoing is considered with the avalanche of other evidence of misconduct in the handling of the claims against the insured. Most certainly additional damages may be recovered where, as here, it is alleged and proven that the conduct was willful and wanton. In this connection a person may be regarded as acting wantonly who acts without regard to propriety or the rights of others, or is reckless of consequences and yet without settled malice. Moreover, malice does not necessarily impute ill will or hatred. See *Southwestern Railroad Co.* v. *Mitchell*, 80 Ga. 438, 5 S.E. 490, where it is said *"in a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious."* It is that degree of recklessness, with conscious knowledge of its probable harmful consequence, that constitutes that wantonness which in law finds its equivalent in willful and intentional wrong. Wantonness as authorizes exemplary damages does not mean necessarily malice, but a reckless disregard of the rights of others. *Charleston & Western Carolina Rwy. Co. et al.* v. *McElemurry*, 16 Ga. App. 504, 85 S.E. 804. Can it really be said, as a matter of law, that the insurer did not know of the probable harmful consequence to insured when it pursued the defense after plaintiff's gruesome medical testimony was in and it added its own damaging medical evidence out of fear or that the jury here could not, as a matter of law, conclude from these and other circumstances that in this case the insurer was

reckless with conscious knowledge of its probable harmful consequence? We think not!

We point out that Appellant does not contend that punitive damages are not recoverable in such a case as this but merely argues that the facts are not sufficient to show that lack of concern as would give rise to such damages. The jury found otherwise and awarded punitive damages under appropriate charges from the court. Such was within its province under our system of jurisprudence and the appellate court below was correct under Georgia Law in holding that the jury had ample warrant to infer from all the facts that the insurer in this case was guilty of legal willfulness and of a reckless disregard of respondent's rights.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

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APPENDIX

APPENDIX

Expenses of litigation.—The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. Georgia Code Annotated, Section 20-1404.

"Nonresident" to include former residents removed from State.—For the purposes of this Chapter, the word "nonresident," in addition to the meaning customarily attributed to it, shall mean any person, firm or corporation who shall cease to be a resident of this State at any time prior to the service of any summons or other lawful process in any action or proceeding against such person, firm or corporation growing out of any accident or collision in which such person, firm or corporation may have been involved by reason of the operation by him or them, for him or them, or under his or their control or direction, express or implied, of a motor vehicle on any highway, street, or public road of this State: Provided, that no summons or other process shall be served on any such person, firm or corporation under the provisions of this Chapter, if any action could not have been maintained under the applicable Statute of Limitations had such person, firm or corporation continually remained a resident of this State. Georgia Code Annotated, Section 68-808.

Breach of private duties.—Private duties may arise from statute or flow from relations created by contract, express or implied. The violation of any such specific duty, accompanied with damage, shall give a right of action. Georgia Code Annotated, Section 105-104.

Election between tort and contract.—When a transaction partakes of the nature both of a tort and a contract,

the party complainant may waive the one and rely solely upon the other. Georgia Code Annotated, Section 105-105.

Compensation for injury. Nominal damages.—Damages are given as compensation for the injury done, and generally this is the measure when the injury is of a character capable of being estimated in money. If the injury is small, or the mitigating circumstances are strong, nominal damages only are given. Georgia Code Annotated, Section 105-2001.

Aggravation.—In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff. Georgia Code Annotated, Section 105-2002.

General damages and special damages defined.—General damages are such as the law presumes to flow from any tortious act, and may be recovered without proof of any amount. Special damages are such as actually flowed from the act, and must be proved in order to be recovered. Georgia Code Annotated, Section 105-2006.

CERTIFICATE OF SERVICE

This is to certify that I have this date served Mr. A. A. Lawrence, Liberty Bank Building, Savannah, Georgia, and Mr. Kirk McAlpine, 434 Trust Company of Georgia Building, Atlanta, Georgia, Attorneys for Appellant in the foregoing matter, with a copy of this brief by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 12th day of March, 1968.

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ALTON D. KITCHINGS
Attorney for Respondent